Such being my view of the facts and the law on the issue of trespass, I hereby enter judgment for the plaintiff in respect of the three lots of which the plaintiff was not the registered proprietor at the time of the issue of the writ.

Likewise there shall be judgment in favour of the plaintiff in trespass in respect of the nine lots of which the plaintiff was the registered proprietor at the time of the issue of the writ.

The first defendant is guilty of trespass only in respect of the properties described in the schedule to the agreement (exhibit D.17) marked red in the plan annexed to that agreement and is so guilty from 11th July, 1962.

The second defendant is guilty of trespass only in respect of the properties the subject matter of exhibits D.20 and D.21 less that portion sold by him to Lim and Goy who later sold the same to the third defendant and is so guilty from 11th July, 1962.

The third defendant is guilty of trespass only in respect of the properties the subject of the agreement (exhibit "A" page 46) and is so guilty from 11th July, 1962.

In each of the three cases I say that the defendants are guilty only with effect from 11th July, 1962, not 7th July, 1962, the date specified in the pleadings, because the letter (exhibit "A" page 52) sent to Periathamby Chettiar by the plaintiff asked that Periathamby Chettiar, his tappers, labourers and workmen should leave on or before 10th July, 1962. And they are so guilty only until the date they vacated the properties in pursuance of the interlocutory injunction issued before the hearing.

In consequence of my judgment there shall be an order in terms of the plaintiff's prayer (i). As regards prayers (ii) and (iii) there shall be an enquiry to be held by the Assistant Registrar of this court as to damages and accounts.

As regards costs, the plaintiff's claim is allowed with costs and the defendants' counterclaims are dismissed with costs. Taxed party and party costs on higher scale, to be paid by defendants to plaintiff, one order of costs jointly and severally against all three defendants. Certificate for two counsel.

*Judgment for the plaintiff.*

Solicitors: *Presgrave & Matthews*; *Jayadeva & Zahir.*

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## *RE* THE PEACE INSURANCE CO. LTD.

**[O.C.J. (Ong J.) February 12, 1964]**

**[K.L. — Companies Winding-Up No. 10 of 1962]**

*Company Law — Insurance Company — Loan by directors to themselves — Sale of shares by former directors to new directors — Purchase price of shares paid out of assets of company — Whether both sets of directors old and new liable — Companies Ordinance, 1940-1946, s. 137(1).*

*Life Assurance Companies (Compulsory Liquidation) Act 1962.*

The Peace Insurance Co. Ltd. was on March 13, 1962 compulsorily wound up under the Life Assurance Companies (Compulsory Liquidation) Act 1962.

On September 27, 1961 Foo Ah Soo and two others (hereinafter called the new directors) bought the entire share issue of the company for $744,000 from Hor Hoi Thin and eight others (hereinafter called the former directors). Payment was by deposit of $80,000 and balance of $664,000 to be paid when transfer to new directors made. Of the said sum, $547,253.56 came out of the funds of the company in a bank.

On November 8, 1962 the liquidator applied by summons in chambers for a declaration that the new directors were guilty of misfeasance and breach of trust as directors by applying the sum of $547,253.56 of the company's moneys to their own use. By a further summons the liquidator applied for a declaration that the nine former directors and each of them was guilty of misfeasance and breach of trust by (a) authorising and/or procuring a loan of $40,000 to themselves contrary to section 137 of the Companies Ordinance and (b) procuring or permitting to be paid to themselves for the sale of the shares in the said company for $744,000 out of funds belonging to the company.

The nine former directors admitted receiving $744,000 but said $80,000 and a further $116,746.44 had been paid by the purchasers with their own money and denied that they had any knowledge that the company's moneys had been used to pay them the purchase money or that they knew or consented to such course of action. A loan of $20,000 was admitted.

The applications were consolidated and heard together.

**Held:** (1) it was conclusively proved that the former directors agreed to place company's funds at the disposal of the new directors;

(2) it was no defence for the new directors to say they were not even members of the company when they drew on the company's account as directors;

(3) all directors former and new were guilty of misfeasance and breach of trust and must pay the company $744,000 with interest thereon at 6% per annum;

(4) the $80,000 paid to Foo Ah Soo one of new directors in form of deposits paid in advance by persons who were to be appointed agents of the company after its takeover and paid to former directors was money had and received by Foo Ah Soo for the use of the company and Foo Ah Soo had misapplied it;

(5) in making loans to themselves to the total of $37,500 the old directors were in contravention of section 137(1) of the Companies Ordinance.

*Cases referred to:—*

(1) *Coventry & Dixon's case* (1880), 14 Ch. D. 660, 670.

(2) *Re Sale of Hotel & Botanical Gardens Ltd.; ex parte Hesketh* (1898), 78 L.T. 386, 370.

COMPANIES WINDING-UP.

*Y. S. Chong* for the liquidator.

*A. Jeyadeva* for 3 of the respondents.

*Philip Hoalim Jr.* and *Lim Kean Chye* for 9 of the respondents.

*Cur. Adv. Vult.*

**Ong J.:** The Peace Insurance Company Ltd. was one of the scores of pseudo-life-insurance companies compulsorily wound up under the Life Assurance Companies (Compulsory Liquidation) Act 1962. The winding-up order was made by this court on March 13, 1962. The directors holding office on that date were three persons, Foo Ah Soo, an insurance agent, his friend Ooi Kheng Hoe, who previously had been employed by various companies as clerk in their insurance department, and Foo's impecunious brother-in-law, Khoo Poh Thye, an illiterate working for Foo for $70 monthly wages until his meteoric rise to eminence as a company executive.

The undisputed facts were that on September, 27, 1961, they had bought up the entire share issue of the company for $744,000 paid in cash. Of this sum $547,253.56 came out of the funds of the company. Payment was made to the former directors. These former directors, nine in all, were Hor Hoi Thin, Hor Seng Cheong, Wong Keng San, Chin Yew Sin, Chin Foo Kee, Chin Yew Choon, Chin Teik Kwong, Ng Kai Ming and Leong Man Hoi. Except one restaurant owner, all of them were proprietors or partners of Chinese medicine-shops.

On November 8, 1962, Mr. Yeoh Cheang Kang, as liquidator applied to the court by summons in chambers for a declaration that the three directors, Foo, Ooi and Khoo, had been guilty of misfeasance and breach of trust as directors by applying the said sum of $547,253.56 of the company's moneys to their own use on September 27, 1961, and for an order that they repay such sum to the liquidator with interest.

They filed their affidavit in reply on November 23, 1962. Therein it was stated that, on September 12, 1961, an agreement was made between Foo and three of the then directors, Chin Yew Sin, Hor Seng Cheong and Hor Hoi Thin, for the sale to Foo of all the issued shares in the company — namely, 245 shares of $1,000 each, fully paid — at the price of $800,000. On execution of this agreement a deposit of $80,000 was paid by Foo to account of the purchase price, such sum having been raised by him, with the knowledge of the three vendor-directors in the form of deposits paid in advance by persons who were to be appointed agents of the company after its take-over. The balance of $720,000 was payable on completion on September 26, 1961, and the defendants averred that such sum was planned to be made available out of the funds of the company by an arrangement enabling Foo to operate and draw on the company's account with its bankers, the United Malayan Banking Corporation, Limited, Penang. Pursuant to such arrangement transfers of the 245 shares were stamped on September 27, 1961, and immediately thereafter the company's banking account was made operable by Foo, Ooi and Khoo as the new directors. Thereupon they drew out $547,253.56 (the figure $551,211.00 stated in the affidavit being manifestly an error) from the company's account and paid in the same to the credit of Foo's personal account with the same bank, from which last account he drew $664,000 by a cheque made out to cash or bearer, which he handed to the vendor-directors.

The deponents then went on to explain how the balance of the purchase price came to be reduced from $720,000 to $664,000, the difference of $56,000 being made up of a rebate of $16,000 deducted as 2 per cent commission and a sum of $40,000 which the former directors had taken on loan from the company. On the grounds stated above these three directors prayed that the former directors be ordered to repay the moneys in their stead.

On the basis of the above affidavit, the liquidator filed his report on December 6, 1962, and took out a further summons in chambers applying, under section 267 of the Companies Ordinance 1940/46, for a declaration that the nine former directors and each of them had been guilty of misfeasance and breach of trust in relation to the company by (a) authorising and/or procuring a loan of $40,000 to themselves contrary to section 137 of the Ordinance and (b) procuring or permitting to be paid to themselves for the sale of the shares in the said company the total sum of $744,000 out of funds belonging to the company, and the liquidator further applied for an order that these same persons do repay the said sums to the liquidator with interest.

Section 267(1), to set out only the relevant words, provides that

> "if in the course of winding up a company it appears that any....past or present director....has misapplied or retained or become liable or accountable for any money or property of the company, or has been guilty of any misfeasance or breach of trust in relation to the company, the court may, on the application of the ....liquidator examine into the conduct of the.... director....and compel him to repay or restore the property or any part thereof respectively with interest at such rate as the court thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust as the court thinks just."

An affidavit in reply was sworn by Hor Hoi Thin and Hor Seng Cheong on January 14, 1963. A third director, Chin Yew Sin, by a separate affidavit, confirmed their statements to be true. Briefly, they admitted receiving payment of $744,000, but stated that as far as they were concerned the first payment of $80,000 "was made by the purchasers and with their own money." They further denied that they had

any knowledge of the company's moneys being used to pay them the said purchase price or that they knew or consented to any such course of action as alleged by Foo. Finally, they admitted to giving a loan, not of $40,000 but of $20,000, to four directors pursuant to a resolution of April 14, 1961.

The applications against both sets of directors were consolidated and heard together.

The history of the company, during its short life, throws light on the conduct of its directors. The certificate of incorporation was issued on October 10, 1960. The nominal capital of the company was $1,000,000 divided into 1,000 ordinary shares of $1,000 each. The original subscribers to the Memorandum of Association were three persons, described as merchants, who had subscribed to 5 shares each. They were bought out for $210,000 by Hor Hoi Thin and his associates, of whom nine were appointed directors on October 30, 1960. Their names had already been set out. At the directors' meeting on November 17, 1960, it was resolved that the company should commence business on December 1, 1960.

The nature of the business may be gathered from the minutes of the General Meeting held on October 30, 1960. The company were to issue three categories of policies. In group A, a monthly subscription or premium of $3 kept up for a qualifying period of 6 months entitled the policy-holder to payment of $300 on the death of the life insured, provided of course that payments were continued till the death. In groups B and C, the qualifying period was the same — 9 months — but monthly subscriptions of $3 and $5 respectively entitled the claimants to payments of $400 and $600; for a specimen policy of group B, see Ex. A. 34, issued on the life of a female 75 years old. There was no requirement of a medical examination — as is invariably the case in policies of reputable life insurance companies — and the majority of the lives insured according to Hor Seng Cheong, were old people. There were no restrictions on the number of policies a person could take out on one life, and Hor Seng Cheong thought the number of such policies could be as many as six. Agents of the company were remunerated with 15 per cent of collected subscriptions, monthly and yearly.

The rise and fall of the business was somewhat spectacular. In the first month, December 1960, the collections were $170 only. Thereafter in round figures the takings were in January 1961, $30,000; February $30,000; March $55,000; April $78,000; May $95,000; June $125,000; July $101,000; August $153,000; September $129,000. The steady rise maintained in the collections was, of course, due to the policies being kept alive for the qualifying period by monthly subscriptions. On the other hand there was a steady decline of new cases after the peak was attained in February 1961. From the monthly business reports presented at the meetings of the Board of Directors I have culled the following figures of cases accepted: January 6841, February 26449, March 8251, April 6444, May 11452, June 5779, July 2590, August 1606.

After the qualifying period claims started to come in, from August 1961. For that month the total paid out was $6,000, and for September 1961 over $30,000.

There was no evidence of the directors carrying out any investments with the moneys collected as premium, other than a loan of $40,000 given to some of the directors themselves (contrary to section 137 of the Companies Ordinance) at 1 per cent per month interest. Claims therefore could only have been met out of collections of premium, an impossible state of affairs for any genuine life insurance business.

On the other hand these directors bled the company mercilessly. Between February 1961 and September 1961 they drew a total of $25,800 for directors' travelling expenses, and under the head of "agency allowances" a total of $44,300. These two sums add up to $70,100. Eight of the 9 directors — the exception was Chin Foo Kee — were at the same time acting as agents of the company; and, of a sum of $14,700 which the directors voted to themselves as "agency allowance" paid out on September 18, 1961, Hor Hoi Thin said: "For the 3 months since commencement of business in December 1960, we did not charge, so this sum of $14,700 was voted by us to pay for those 3 months." This clearly shows that "agency allowance" payments were moneys voted by the directors to reward themselves.

As hard-headed businessmen these directors could not possibly have failed to realise what would have been apparent even to any simple-minded merchant. Settlement day was fast approaching while new cases had dropped steadily from 5779 in June to 2590 in July and 1606 in August.

Early in September 1961, therefore, the directors decided to rid themselves of liability in respect of future claims. The facts speak for themselves. For some days Hor Hoi Thin had been negotiating with Foo, and on September 12, 1961 an agreement was signed between Chin Yew Sin, Hor Seng Cheong and Hor Hoi Thin, (representing all share-holders of the company) and Foo Ah Soo for the sale to him of all the issued shares of the par value of $245,000 for $800,000. Upon the execution of this agreement Foo paid them $80,000 as deposit to account of the purchase price.

Foo has alleged, as I mentioned earlier, that the three vendor-directors knew this deposit to be made up of moneys which properly belonged to the company — at least Hor Hoi Thin did,

because Hor gave him the idea and the plan for taking over the company without cost to Foo himself. This was Foo's evidence:

"Hor Hoi Thin came to my office at China Street to ask me to buy the Company. I said 'what a foolish idea. I had no money to buy'.

He had named $800,000 as the price. He said, if I had no money there were ways and means. I asked what were the ways and means. He said I need only pay 10% of the $800,000 first as deposit. I said I did not even have $8,000, let alone $80,000.

He said many companies nowadays had appointed agents, and such agents had to pay deposits. He suggested that I could appoint agents from whom I could get such cash deposits. As to the balance of $720,000 he said his Company had plenty of money, and that upon the transfer of the business, these moneys could be given to me and I could utilise the moneys to pay off the balance of the purchase price."

Hor Hoi Thin denied these allegations. He said he thought Foo was a man of means, although he had to admit he knew that Chop Toong Nam, a shop owned by Foo, had closed down at least three years earlier. But these men had known each other for the past twenty years. If Hor was unaware of Foo's true credit standing — which I do not for a moment believe — he could have discovered it for himself without the least difficulty. Foo was a man who had been in the public eye during the State elections.

I believe the truth to be that both Hor and Foo knew equally well where the purchase moneys were to be found. It is immaterial whose idea it was. Foo had had long years of experience in a variety of insurance business; so he did not require any advice from Hor. I believe that Hor had no scruples either about making the company's funds available to Foo. By this sale the outgoing directors and shareholders stood to gain over half-a-million dollars. Since they could not pay themselves directly out of the company's moneys, that was where Foo came in. In return for his part in the transaction he could step in their shoes and milk the company as they had done before him. There is abundant evidence before me to justify such conclusions.

Taking the events in chronological order, I am satisfied that Foo told the truth about how he came to raise the $80,000. His evidence is corroborated by the three agency agreements (Exhibits R.15, R.16 and R.17) and by the entries in his bank statement (Ex. R.20). The moneys were not his own. Quite apart from its being an admission against his own interest, no other conclusion can possibly be drawn consistent with the evidence.

Next, in point of time was the "Special Board of Directors Meeting." All nine retiring directors and their three successors attended: (see the Minutes, Ex. A3). It was held at the unusually late hour of 10 p.m. in a hotel room in Penang on September 25, 1961. It was of course the eve of completion of the transfer, and that was why the meeting had to take place with such desperate urgency because, under clause 4 of the agreement of September 12, 1961 (Ex. R.37) time was of the essence of the contract, and, what is more important, because in the events that happened it is clear that the parties had not yet worked out to their mutual satisfaction how they were to place the company's moneys at Foo's disposal the next day without appearing to do so.

Between September 12 and September 25 Foo had deposited with his solicitors Messrs. Jeyadeva & Zahir, advances of deposits collected from prospective agents against the date when they would form part of the purchase price payable to the vendors. The sum as accumulated had reached a total of $116,746.44, but half-a-million dollars were still needed to make up the balance of the purchase price. The problem then was whether or not completion could take place before the solicitors as stipulated in the agreement — which would have led to the most embarrassing disclosures — and whether it was feasible to make these solicitors stake-holders of the purchase price. As Hor Seng Cheong had said, "We disagreed to his proposal to pay over the company's moneys into his lawyer's hands. Foo wanted his lawyers to act as stake-holders." Thus it was that the problem was debated till about an hour before midnight when the following resolution came to be passed.

"BANK ACCOUNTS: At the request of Mr. Foo Ah Soo, consequent to the transfer of the said shares, it was RESOLVED, as a first step in handing over the management, to hand over and transfer the bank account with the United Malayan Banking Corporation Ltd., Penang, to Mr. Foo Ah Soo as custodian of the said account. That Mr. Foo Ah Soo shall be responsible for the proper and efficient management of the said account, which the said Mr. Foo had agreed. That the Bankers be informed of the change."

This resolution, made with such precipitate haste, is most significant because I regard it as conclusive proof that every person present at the meeting agreed, after the fullest deliberation of the question, to place the company's funds at Foo's disposal with no misapprehensions as to what he proposed to do. Designating him "custodian" and making him "responsible for the proper and efficient management" thereof was nothing but sheer cant and hypocrisy. By accepting Foo's proposal they simply underlined their awareness of his intentions. Why, otherwise, the necessity for such transfer? Why were no safeguards provided against his misapplication of the funds to be placed at his disposal? In a regular and honest transaction such a matter would have taken its proper place in the sequence of events, and there would have been no urgency. If Foo had the money to pay, without recourse to the company's funds, the transfer of the bank account was pointless. The retiring directors could, by the simple step of notifying the bank,

be stopped from operating their account at any time.

However, passing a resolution was one thing; its execution was another. On the following day, September 26, the parties found themselves confronted with the problem of ways and means. It was suggested by counsel, Mr. Lim Kean Chye, in cross-examination of Foo (p. 69) that there was "hard bargaining" on that day. Foo denied it, but I believed it to be true. Since it was impossible in the circumstances to make any solicitors stake-holders of the company's moneys, the only alternative was to place the company's bank account at Foo's disposal. In that event, there naturally arose the danger that Foo would have an opportunity to make away with all the money he could lay his hands on without first paying the $664,000. I think the hard bargaining above referred to could only have been concerned with ways and means to safeguard the vendors against some such act of treachery on the part of Foo. If not this, what else was there for hard bargaining after the resolution passed the previous night? All they had to do was simply to transfer the bank account. I can see no reason why completion should not go through on that day as planned unless it was because no solution had been found to dispel their mutual distrust.

Early the next morning, however, Hor Hoi Thin had solved the problem to his own satisfaction. So, at 9.30 a.m. on September 27, Hor Hoi Thin opened a new account with $500 in the United Malayan Banking Corporation Limited for the express purpose of receiving payment of the $664,000 at the same premises in which both the company and Foo also had their accounts. In this way it was ensured that neither party could be overreached by the other. Both cheques could be presented simultaneously by the parties in their joint presence, namely, (a) the cheque transferring $547,253.56 from the company's account to the credit of Foo's personal account, and (b) the cheque for $644,000 drawn on Foo's personal account for payment into the vendors' account. On the evidence I am satisfied that the latter cheque was in fact presented at the same time as, or so shortly after, the former as to have the same effect.

I have not overlooked the fact that it is in evidence that Hor Hoi Thin was already a customer of this bank. But the account was that of the partnership of Chop Chup Sang. The cheque for $664,000 made out to cash or bearer, could easily have been paid into the firm's account, so that the new account was entirely unnecessary. I am therefore of opinion that objections must have been raised by the other directors against placing their moneys at the sole disposition of Hor Hoi Thin and his partners. Consequently it seems to me that the question of securing payment of the balance of the purchase price must have been considered with the greatest of care by the whole body of directors, before Hor Hoi Thin presented to them his solution.

At this stage it will be pertinent to refer to the manipulation of banking accounts by Hor Hoi Thin and his associates, as revealed by the evidence. The banks concerned were the United Malayan Banking Corporation Limited (called United Malayan for short) and the Malayan Banking Limited. United Malayan were at all times the bankers for the Peace Insurance Company, for Foo Ah Soo, and for Hor Hoi Thin's medicine shop. On July 27, 1961 the directors opened a fixed deposit account for the company in Malayan Banking with a sum of $200,000. On September 25, 1961 they withdrew this deposit and transferred the $200,000 into the company's current account in United Malayan (see p. 47, evidence of Hor Hoi Thin). The reason for this step is clear from the Bank Statement (Ex. A1). Without this sum Foo would have been unable to draw the $547,253.56 for payment into his own personal account to meet the cheque for $664,000. Even with this accretion, the balance was still only $3,957.82 after withdrawal of the half-million dollars. Hence the transfer of account was clearly made for that specific purpose.

On September 12, 1961 Hor Hoi Thin, Hor Seng Cheong and Chin Yew Choon opened a joint account in Malayan Banking with the deposit of $80,000 received from Foo (pp. 54, 68). On September 25, they drew $20,000 on the company's account in the United Malayan. It had been recently repaid by Fook Sang Pawnshop, and this sum went into the pool with the rest of the moneys making up the purchase price for distribution among the share-holders (p. 47). This sum was paid into the newly-opened joint account of the three directors in Malayan Banking. This joint account however, was closed on September 27 by total withdrawal and paying in of the entire sum into a newly-opened account in United Malayan. Such new account was the one opened earlier that day at 9.30 a.m. for the express purpose of receiving Foo's cheque for $664,000. The relevant portion of the evidence, given by Hor Seng Cheong, is as follows:

"*To Court*: On 12.9.1961, Chin Yew Sin, Chin Yew Choon opened an account in Malayan Banking. This account was opened for the purpose of receiving the $80,000 deposit from Foo Ah Soo. A further sum of $20,000 was paid in on 26.9.1961 — by cheque drawn on the United Malayan Banking Corporation. On that day — 26.9.61 — as we had an account in the Malayan Banking Ltd. we paid the cheque into that account.

Q. Why did you not on that day, the 26th, open an account with the United Malayan Banking Corporation?

A. We were too busy that day to do so.

Q. Had you any intention on 26th, to open an

account in the United Malayan Banking Corporation?

A. No.

Q. That intention was formed that night or next morning?

A. That very night — the 26th — Hor Hoi Thin suggested that as his name was not in our joint account in Malayan Banking Ltd., therefore he wanted us to open a fresh account.

Q. Could not Hor Hoi Thin's name be substituted for Chin Yew Choon's?

A. Hor Hoi Thin wanted to open a new account in the United Malayan Banking Corporation.

Q. Why was it so urgent that the account is opened early on 27th?

A. It was Hor Hoi Thin's idea — since all three of us were available — that we should proceed to open the new account."

I turn now to the other events of September 27. At 10 a.m. a meeting of the Board of Directors was held in the Peking Hotel, Penang, attended by the full board of nine and their secretary. Foo and his two associates were also there as observers. The minutes (Ex. A4) read as follows:

*"The Peace Insurance Company Limited.*

Minutes of Board of Directors' Meeting held at room No. 230 of Peking Hotel, Penang Road, Penang on 27th September, 1961 at 10.00 o'clock in the morning.

Present: Chin Foo Kee (chairman) Chin Yew Sin, Hor Seng Cheong, Chin Ewe Choon, Hor Hoi Thin, Wong Keng San, Ng Kai Ming, Leong Man Hai, Chin Teik Kong and secretary Foo Ah Kow.

Observers: Foo Ah Soo, Ooi Khong Hee and Khoo Poh Thye.

Notice: All the directors were present, no notice was issued.

Appointment of new directors: Mr. Chin Foo Kee, Chin Ewe Choon, Wong Keng San, Ng Kai Ming, Leong Man Hoi and Chin Teik Kong had jointly tendered their resignation as directors of the company having transferred their respective share holdings in the company to Mr. Foo Ah Soo and or their nominees.

RESOLVED: to accept their resignation and to appoint the following new directors to replace the out going directors.

That Mr. Ooi Kheng Hoe be and is hereby appointed the chairman of the company.

That Mr. Foo Ah Soo be and he is hereby appointed the managing director of the company.

That Mr. Khoo Poh Thye be and he is hereby appointed the Treasurer of the company.

Issue of certificates: RESOLVED that the following new certificates be sealed with company's seal and issued to the following shareholders and that their names be entered in the members' register.

| Cert. No. | Distinctive from | No. to. | Name of Shareholder | No. of shares. |
|---|---|---|---|---|
| 34 | 1 | 53 | Foo Ah Soo | 53 |
| 35 | 54 | 63 | Khoo Poh Thye | 10 |
| 36 | 64 | 73 | Foo Ah Soo | 10 |
| 37 | 74 | 83 | Ooi Kheng Hoe | 10 |

Persons to operate bank account: RESOLVED that Messrs. Chin Foo Kee, Wong Keng San, Chin Ewe Choon and Hor Hoi Thin shall as from today ceased to operate the bank account opened with the United Malayan Banking Corporation Limited, Penang. It is further RESOLVED that the Bank is hereby authorised to debit the account with the bank with all such orders when signed for and on behalf of the company by any two of the following three directors — Messrs. Foo Ah Soo, Ooi Kheng Hoe and Khoo Poh Thye and that all endorsements by any two of the three directors.

THAT the bank be informed of such a change.

Others: The meeting was adjourned at 12.00 noon.

(Sd.) Ooi Kheng Hoe
Chairman.

Certified correct

(Sd.) Chong Ah Kow
Secretary."

These minutes clearly show complete disregard by the participants not only of the law relating to companies but also of their articles of association. The secretary, as their professional adviser on company affairs, had been at their beck and call since September 25, so ignorance of the law affords no excuse. A member of a company is one whose name is entered in its register: see section 27(2) of the Companies Ordinance. Regulation 17 of Table A, which applies, states that the transferor shall be deemed to remain a holder of the share until the name of the transferee is entered in the register of members in respect thereof. On September 27, as the Secretary admitted in his evidence, the share register was in his own office in Ipoh. It was not until the following day, after his return to Ipoh, that he was able to enter the transfers to Foo and his associates on the register. It is therefore clear that when Foo and his associates were voted into the Board and empowered to deal with the company's funds none of them had qualified even to become a member, much less a director. Moreover, the resignation of six of the directors at the commencement of the meeting, which was accepted, left that meeting without the quorum necessary for the further transaction of business (see article 15).

It only remains to advert to one other material aspect of this case. Of the assets and liabilities of the company, Hor Hoi Thin, at page 48, said:

"We bought the company for $210,500. As at end of September 1961, I cannot give any account of the assets of the company. This company owned 4 motor cars, furniture and fittings in 4 offices, the $200,000 cash deposited with Government as security. I had no idea of the extent of the company's liabilities in September 1961."

Further on he said:

"The price of $800,000 included the $200,000 security deposit required by law and all other assets, and over $500,000 in the bank, and cash in hand in various branches totalling over $40,000. The deposit of $200,000 came out of the company. We collected from all shareholders $245,000 to start the business, of which sum we deposited with Government $200,000."

And finally:

"In arriving at the price of $800,000 I included the sum of over half-a-million dollars in the bank. That

money in the bank was the company's money. I say all that money was the company's property, and all the cash in hand in the branches was also the company's property. I considered the moneys to be the property of the company — to be its assets. The money would have to pay claims."

It needs no explanation that the true take-over value of any solvent company should be the value of its assets over and above its liabilities. The moneys in the bank derived from collections were admittedly not assets, yet for purposes of the sale were treated as such. It is impossible to believe that Foo or the vendors were blind to this fact. Consequently here again we have further corroboration that all parties knew where the purchase moneys were coming from. Nor was Foo the vendors' cat's-paw as he tried to make out. On his own admission he was abetting them in milking the company dry and I do so find as a fact.

Finally, I come to the question of law. This aspect of the case raises no difficult problems. "Misfeasance" said James L.J. in *Coventry & Dixon's Case* (1) "means misfeasance in the nature of a breach of trust, that is to say, it refers to something which the officer of such company has done wrongly by misapplying or retaining in his own hands any money of the company or by which the company's property has been wasted, or the company's credit improperly pledged. It must be some act resulting in actual loss to the company."

The same case is also authority for the proposition that *de facto* directors who acted to the detriment of the company are as liable as *de jure* directors. Accordingly it is no defence for Foo and his two associates to say that they were not even members of the company when they drew on the company's account in United Malayan as directors. Hence they ought to be liable for repayment of the sum of $547,253.56. The cheque was signed by Foo and Ooi and endorsed by all three for payment into Foo's personal account.

In addition to the $80,000 deposit, Foo had collected a further $116,746.44 from prospective agents for payment to the company. This sum deposited with Foo's solicitors, was on September 27 withdrawn and paid into his personal account, together with the cheque for $547,253.56, in order to meet his cheque for $644,000. The result is that all moneys had and received by Foo for the use of the company had been utilised for paying out the $664,000. Hor Hoi Thin and his associates had received in all two sums, $80,000 and $664,000. Since the $80,000 — although paid direct by Foo to the vendors — was also money had and received by him for the use of the company, it was a misapplication by Foo of the company's moneys of which the vendors knowingly had the benefit. *In Re Sale of Hotel & Botanical Gardens Ltd., ex parte Hesketh* (2) Lindley M.R. said, with reference to section 10 of the Companies (Winding-Up) Act, 1890 (53 & 54 Vict. C. 63), which corresponds with our section 267, as follows:—

"It would, I think, be a very narrow construction of section 10 to say that 'moneys or property of the company' means only that which belonged to the company before it came into the possession of the person liable to account for it. Money had and received for the use of a company at law or in equity may, without impropriety, be called money of the company where accuracy of language in respect of ownership is immaterial."

Therefore, in respect of the total sum of $744,000 Hor and his associates should be liable for repayment to the liquidator.

As to the loan of $40,000 it is immaterial for practical purposes to consider any other fact than that, of this sum of the company's moneys, $20,000 had found its way into the joint account of three of its directors in undoubted breach of trust, and was admittedly taken by them as part of the purchase price. This fact, of course, is further proof — mention of which I had overlooked — that the vendor-directors were well aware of the company's moneys being utilised as purchase money for their shares. A purchaser, who was known to be unable to find a mere $80,000, could not have been able to raise nearly $800,000. The $40,000 was loaned, as to $20,000, to Fook Sang Pawnshop — of which five directors of the company were partners — and $17,500 to three directors Chin Teik Kwong, Wong Keng San and Hor Hoi Thin, leaving only $2,500 which was not lent in contravention of section 137(1) of the Companies Ordinance.

I accordingly declare and order as follows:

1. Declare that the 9 respondents namely, Hor Hoi Thin, Hor Seng Cheong, Wong Keng San, Chin Yew Sin, Chin Foo Kee, Chin Yew Choon, Chin Teik Kwong, Ng Kai Ming and Leong Man Hoi, former directors of the company, and each of them had been guilty of misfeasance and breach of trust in relation to the company by procuring, authorising or permitting loans to themselves as directors amounting to $37,500 contrary to section 137 of the Companies Ordinance 1940 - 1946;

2. Declare that the said 9 former directors of the company and each of them had been further guilty of misfeasance and breach of trust in relation to the company in procuring or permitting to be paid to themselves for the sale of 245 shares in the company. the total sum of $744,000 out of funds belonging to the company;

3. Declare that the 3 respondents Foo Ah Soo, Ooi Kheng Hoe and Khoo Poh Thye as directors, and each of them, had been guilty of misfeasance and breach of trust in relation to the company in misapplying moneys of the company by paying to the 9 former directors the sum of $744,000;

4. Order that all the 12 respondents, former directors and directors of the company, and each of them, do pay to the appellant, as liquidator of the company, the sum of $744,000 with interest thereon at 6% per annum from September 27, 1961 to date of payment;

5. Order that the said 9 respondents, former directors of the company and each of them do further pay to

the liquidator the sum of $37,500 with interest thereon at 6% per annum from September 27, 1961 to date of payment;

6. Order that the 12 respondents do pay to the liquidator his costs of and incidental to these applications to be taxed in default of agreement.

*Order accordingly.*

Solicitors: *Shearn Delamore & Co.*; *Jayadeva, Zahir & Ismi*; *Lim Cheng Ean & Co.*

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## MUNUSAMY v. PUBLIC SERVICES COMMISSION

**[F.C. (Thomson L.P., Barakbah C.J. (Malaya) and Neal J.) February 21, 1964]**

**[K.L. — Federal Court Appeal No. 5 of 1964].**

*Constitutional Law — Public services — Restriction on dismissal and reduction in rank — Reversion not amounting to reduction in rank — Constitution of the Federation of Malaya, article 135 — Certiorari.*

*Specific Relief — Mandamus — Specific Relief (Malay States) Ordinance, 1950, s. 44.*

The appellant an Assistant Immigration Officer of about 7 years service applied on February 21, 1957 for the post of Assistant Passport Officer for service in the then Federation of Malaya Government Overseas Missions in answer to an advertisement in the *Malay Mail* newspaper dated February 19, 1957. One of the qualifications necessary for this appointment was that the applicant should possess a "School Certificate". The appellant in his application stated "I passed my School Certificate." On August 21, 1957 the appellant was informed by letter from the Chief Secretary's Office that he had been selected for appointment as Assistant Passport Officer, External Affairs Service, on probation. On August 25, 1957 the appellant left for Karachi where he assumed duties as Assistant Passport Officer in the office of the High Commissioner for the then Federation of Malaya in Pakistan. Sometime on or before November 6, 1957 the Public Services Commission came to know that the appellant did not possess the Cambridge School Certificate and on November 30, 1957 the appellant received a letter from the Permanent Secretary, Ministry of External Affairs recalling him for reposting. On his return the appellant found that criminal proceedings were being taken against him for an offence under section 182 of the Penal Code. In the meantime on February 10, 1958 the Controller of Immigration informed the appellant that because of the criminal proceedings he had been interdicted from duty on half monthly emoluments with effect from January 24, 1958. Then on May 23, 1958 after the prosecution appeal had failed the secretary of the respondents informed the appellant that as he had not passed the School Certificate as required he was underqualified for the appointment and that it had been decided to terminate his appointment as Assistant Passport Officer and that he would revert to his former post on the terms and conditions under which he was serving before his appointment to the External Affairs Service. The appellant commenced proceedings in which he prayed for an order of *certiorari* to bring up and quash the decision of the Public Services Commission contained in their letter of the May 23, 1958 and for a consequential order of mandamus against the Commission. Ong J. dismissed the application but made no order as to costs ([1960] M.L.J. 221). On appeal,

**Held:** as the appellant was reverted back to his former post as probationary passport officer (because he did not have the necessary qualification) there was never any hiatus in his employment in the public service nor can it be said that he suffered a punishment by his removal on that ground. There was therefore neither a dismissal nor a reduction in rank within the meaning of article 135(2) of the Constitution.

**[Editorial Note:** Mr. Justice Neal, the third member of the Federal Court left Malaysia on retirement without giving his judgment and in accordance with section 16(2) of the Courts Ordinance, 1948, where there is no majority decision, the decision of the trial Court shall stand. Section 16 has since been repealed by the Courts of Judicature Act, 1964 (w.e.f. 16-3-64): see now section 42 of the Act which provides for re-hearing].

*Cases referred to:—*

(1) *Shyamlal v. State of Uttar Pradesh* A.I.R. 1954 S.C. 369.

(2) *Satish Chandra* v. *The Union of India* A.I.R. 1953 S.C. 250.

(3) *P.L. Dhingra* v. *Union of India* A.I.R. 1958 S.C. 36.

(4) *Adegbenro* v. *Akintola* [1963] 3 W.L.R. 63.

(5) *Laximinarayan Chironjilal Bhargava* v. *The Union of India* A.I.R. 1956 Nagpur 113.

FEDERAL COURT.

*V. Kandiah Palasuntharam* for the appellant.

*Au Ah Wah* (Treasury Solicitor) for the respondents.

*Cur. Adv. Vult.*

**Thomson L.P.:** This is an appeal from a decision of the High Court dismissing an application by a Mr. Munusamy for an order of *certiorari* to bring up and quash a decision relating to him made by the Public Services Commission and for an order of mandamus against the Commission.

The facts of the case are not in dispute.

Early in the year 1957 the then Government was engaged in preparing for Independence which was expected later in the year and did in fact come into effect on 31st August. In this connection it was known that under the new Constitution the general public service (and certain other services) would be controlled by a Public Services Commission and that staff would have to be recruited for the diplomatic missions which would have to be set up abroad.

With regard to the first of these matters the then Government nominated a body of persons who would become the Public Services Commission under the new Constitution with a view to their obtaining experience of their future duties. This body of persons was called the "Public Services Commission (Designate)" and had no legal standing. It dealt in an advisory capacity with applications for appointment and other matters but appointments were actually made by the Chief Secretary to the Government.

With regard to the recruitment of persons for overseas missions an advertisement was inserted in the *Malay Mail* on 19th February, 1957. That advertisement commenced as follows:—